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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

No. 1222

DAVID H. ALSOP, et al
*Petitioners*

*vs.*

ROBERT AUGUST PASCUCCI, Infant
By DAVID A. HART, Guardian ad Litem,
*Respondent*

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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In The

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*Respondent*

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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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*To the Honorable Chief Justice and Associates Justices of the Supreme Court of the United States:*

The attorneys, on behalf of your petitioners, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia, entered January 29, 1945, (Tr. 31), reversing the order of the District Court of the United States for the District of Columbia, holding a Probate Court, admitting the Will of Agostino Pascucci to probate and record.

## OPINION BELOW

The opinion of the Court of Appeals (Tr. 28) is not yet reported.

## JURISDICTION

The judgment of the Court of Appeals was entered January 29, 1945, (Tr. 31). The jurisdiction of this Court is invoked under Sec. 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and this petition is filed under Rule 38, Sec. 5, of the Revised Rules of this Court, as amended May 26, 1941.

## QUESTION PRESENTED

Whether Title 19, Sec. 103, District of Columbia Code, 1940, (Sec. 1626, District of Columbia Code, 1901), prescribing the methods by which a devise or bequest may be revoked and limiting such methods to "some other Will or codicil in writing or other writing declaring the same, or by burning, canceling, tearing or obliterating the same by the testator himself or in his presence or by his direction and consent; . . . *any former law or usage to the contrary notwithstanding*" (italics supplied) is to have read into it an added method of revocation by operation of law by reason of the marriage and the birth of a child subsequent to the execution of the Will.

## STATUTE INVOLVED

The pertinent statutory provisions are set forth in Appendix A, *infra*, p. 12.

## STATEMENT

The decedent, Agostono Pascussi, late a citizen of Italy, domiciled in the District of Columbia, died testate June 9, 1942, survived by his widow (his second wife) whom he married November 12, 1939, his three sisters, residents of Italy, and a stepson Joseph Biscieglia, son of his first wife by her former marriage. A posthumous child, Robert August

Pascucci, born January 14, 1943, is the only child of the decedent.

Agostino Pascucci left a Will dated June 25, 1937, made five or six years subsequent to the death of his first wife (Tr. 8) and two and one-half years prior to his second marriage, *by which he devised to his stepson certain real estate acquired by the decedent under the will of his first wife,* and bequeathed to his three sisters the residue of his estate, (Tr. 1, 2).

The will was offered for probate by the executors nominated in the Will, (Tr. 10), and probate was opposed by the guardian ad litem for the infant son of the decedent on the ground that the Will was revoked by operation of law by reason of the fact that subsequent to its execution the decedent had married and had issue, (Tr. 13).

The District Court, holding a Probate Court, sustained the Will and ordered its probate, (Tr. 21), pursuant to the opinion of the Court of Appeals in Morris, et al. vs. Foster, et al, 51 App. D. C., 238, 278 Fed. 321, decided February 6, 1922, and certiorari denied, 259 U. S. 582, in which the facts are an exact parallel with those in the instant case, that the marriage and birth of a child subsequent to the execution of the Will did not revoke the Will, as outside the defined methods of revocation in the statute, and from said order the guardian ad litem appealed to the Court of Appeals, (Tr. 24).

The Court of Appeals in its opinion, not yet reported, (Tr. 28), reversed the decision of that Court in the Morris vs. Foster case and reversed the order of the District Court admitting the Will in the present case to probate and record. The judgment of that Court was accordingly entered January 29, 1945.

## SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that Title 19, Section 103, District of Columbia Code, 1940, Section 1626, District of Columbia Code,

1901, is to have read into it an added method of revocation by operation of law by reason of the marriage and birth of a child subsequent to the execution of the Will.

a. The Court of Appeals was bound by the decision of that Court in the case of Morris vs. Foster, certiorari having been denied, in 259 U. S., 582.

b. Methods of revocation are limited to those in the statute.

c. The District of Columbia statute was an original enactment and not adopted from another jurisdiction.

### Reasons for Granting the Writ

1. The decisions of the Court of Appeals in Morris vs. Foster and the instant case are in direct conflict.

a. The situation is analagous to that of conflicting decisions of different Circuit Courts of Appeal.

2. The case, involving the interpretation of a statute affecting property rights, is of general importance or substance.

## ARGUMENT

### Errors Alleged

The Court of Appeals erred in holding that Title 19, Section 103, District of Columbia Code, 1940, Section 1626, District of Columbia Code, 1901, is to have read into it an added method of revocation by operation of law by reason of the marriage and birth of a child subsequent to the execution of the Will.

*(a) The Court of Appeals was bound by the decision of the court in the case of Morris-vs. Foster, certiorari, having been denied in 259 U. S. 582.*

Ordinarily, the denial of a writ of certiorari by the Supreme Court may not indicate the expression of the opinion

and affirmance of the law in the case as applied in the Circuit Court of Appeals; but where there is a single question involved, as in this case, and there have been radical diverse decisions by the lower Federal Courts, the denial of the writ would fairly imply that the Court was satisfied that the point had been rightly decided. See Boise Commercial Club vs. Oregon S. L. RR. Co., 260 Fed., 769, and also Mylroie vs. British Columbia Mills Tug and Barge Co., 268 Fed., 452.

The facts in the case of Morris vs. Foster and in the case now before the court are substantially similar. In both cases, the testator executed Wills prior to marriage and the subsequent birth of children. In both cases, there had been marriages prior to the execution of the Wills. In the case of Morris vs. Foster, there were children by the earlier marriage, and this testator executed his Will without natural children, this constituting the only variance in facts, and this an immaterial variance.

In the case of Morris vs. Foster, the Court decided that the words of the Code provision before the Court must be accorded their plain and ordinary meaning. The Court referred to a prior case and followed its own reasoning in McGowan vs. Elroy, 28 App. D. C., 188, decided in 1908. Thus the interpretation of the statute urged by your petitioners has been the law of the District of Columbia since the adoption of the Code in 1901, and it was judicially so decided.

It is particularly apropos of the present case to quote from the opinion of Mr. Justice Stephens of the District of Columbia Court of Appeals as follows:

> *"The United States Court of Appeals for the District of Columbia is the only Court except the Supreme Court having appeal jurisdiction over the radio orders of the Communications Commission. Pope vs. Federal Radio Commission was, therefore, a ~~conclusive~~ construction of the 1930 Act, petitioned for writ of certiorari having been denied by the Supreme Court."* (italics supplied). —Associated Broadcasters vs. Federal Communica-

tions Commission, 71 App. D. C., 206, 208; 108 Fed. (2), 737, 740.

This pronouncement of the law by Mr. Justice Stephens was in his dissenting opinion, but this Court reversed the majority and did not disturb Mr. Justice Stephen's conclusion, 61 S. Ct., 152; 311 U. S., 132; 85 L. Ed., 87.

In the case of Morris vs. Foster, certiorari was denied by this Court in 259, U. S., 582. The decision in the case of Morris vs. Foster is, therefore, settled law in the District of Columbia.

The question before this Court is not one casually to be thrust aside. It involves property rights which rights have been dependent upon decisions of the District of Columbia Court of Appeals for forty-four years and on the decision of this Court in the case of Morris vs. Foster for twenty-two years. The hardships which may readily follow were the decision of the Court of Appeals to be sustained need no emphasis.

Mr. Chief Justice Groner, who wrote the opinion of the Court in the instant case, thus expressed the effect of a prior decision of his Court in the interpretation of the statute. In De Leon, et al. vs. Rhines, et ux, 64 App. D. C., 73, 76; 74 F. (2) 477, in assenting to the decision reversing the judgment of the lower Court, he said:

> "I concur on the authority of Wolfe vs. Murphy, 47 App. D. C., 296. The doctrine announced there has been accepted as the law in the District of Columbia for more than fifteen years, and to disturb it now would doubtless create more confusion than advantage, but I am constrained to say that if the question were new, I should reach a wholly different conclusion."

*b. Methods of Revocation.*

Methods of revocation are limited to those in the Statute, the wording and phraseology of the Code provision before the Court is clear and unambiguous, and as expressly as can

well be done, enumerates the specific methods by which a bequest or devise may be revoked. Indeed, the appellants in the Court below made no issue of the wording in the statute, nor did the Court of Appeals, in its opinion, attempt to impute to the wording a possibility of revocation other than by the prescribed methods. It was the contention of the appellants, sustained by the Court of Appeals, that a change in circumstances of the testator subsequent to the execution of his Will by his subsequent marriage and the subsequent birth of the child revoked the Will by implication of law, not by virtue of the wording of the statute, but in spite of it.

As the Court of Appeals states in its opinion, there are now statutes in all the States and Territories which in one form or another provide for revocation by operation of law where the testator's domestic situation undergoes a change, the Court citing 5 Wisc. L. Rev., 387. But as the Court of Appeals also truly stated in the case of Morris vs. Foster:

> "Yet, nothwithstanding these changes in the law of other jurisdictions and the ruling in the McGowan case, Congress has not deemed it advisable to amend our Code. We, therefore, adhere to our former ruling." (51 App. D. C. 242.)

To this day, Congress has yet to see fit to amend the Statute in the District of Columbia, and revocation of the bequest or devise may be effected only by such Acts as come within the wording of the Statute.

In Carmen Beach vs. United States, D. C., App. No. 8561, not yet reported, Mr. Justice Edgerton in a dissenting opinion said:

> ". . . I submit this dissent not in defense of the Mann Act but in defense of the authority of Congress. Courts have often construed statutes in novel and questionable ways, but they have not often read an entire phrase completely out of a statute. They did not do so in any of the cases which this court cites. No euphemism can obscure the fact that this court does so when

it imposes upon clear and simple words a construction which allows them no effect. It thereby substitutes for a constitutional and relatively democratic legislative process one that is neither democratic nor constitutional."

In the United States of America vs. Carmen Beach, 89 L. Ed., 574, on writ of certiorari to the United States Court of Appeals for the District of Columbia to review judgment of the Court of Appeals in setting aside a conviction of violating the Mann Act, this Court in reversing the case did not disturb Mr. Justice Edgerton's opinion.

*c. The District of Columbia Statute was an original enactment and was not adopted from another jurisdiction.*

The Court of Appeals based its decision upon a conclusion that the Statute was adopted from the Sixth Section of the English Statute of Frauds, enacted in 1676, and that the Court of Appeals is bound by the interpretation of the Statute by the English Court prior to its adoption. This conclusion seems unsupportable and the Court's position untenable. As the Court of Appeals points out, prior to 1901 when the Statute was enacted the law in the District of Columbia was the law in Maryand. In 1901, the Maryland Statute, originally identical with the 1901 Statute in the District of Columbia, had been amended in 1860 by dropping the concluding phraseology, "any former law or usage to the contrary notwithstanding.

Although in 1801 the respective Statutes were similar it may not logically be argued that the law of Maryland in 1801 was the law of the District of Columbia subsequent to 1901, not logically be argued that the law of Maryland in 1801 was the law of the District of Columbia subsequent to 1901, where there had been an intermediate change in the Maryland Statute. It may logically be assumed that when the Maryland Statute was first enacted it adopted the Sixth Section of the English Statute of Frauds, but it may not logically be assumed that this section of the English Statute

of Frauds was adopted by the District of Columbia, in view of the applicability to the District of the Maryland law. It must be concluded that the District of Columbia Statute was enacted independently of any similar statute in another jurisdiction and that consequently its interpretation by the District of Columbia Court of Appeals in the McGowan and Morris cases was sound.

## Why Writ Should Be Granted

*1. The decisions of the Court of Appeals in Morris vs. Foster and in the instant case are in direct conflict.*

It would seem unnecessary to comment on the settled practice of this Court to grant a writ of certiorari where there are conflicting decisions of different Circuit Courts of Appeal.

Under Supreme Court Rule 38 (5B), 28 U. S. C. A., Sec. 354, a writ of certiorari may be granted when a Circuit Court of Appeals has rendered a decision in conflict with the decision of another Court of Appeals in the same manner.

This rule was applied by this Court in the case of McMullen vs. Hoffman, 174 U. S., 645. In that case, the United States Court of Appeals for the Ninth Circuit had reversed a decree of the Circuit Court of the United States for the District of Oregon. See also Hanover Star Milling Co. vs. Metcalf, 240 U. S. 403; 60 L. Ed. 713.

It would appear to be as clear that this Court will grant a writ of certiorari in the case of conflicting decisions of the same Circuit Court of Appeals resulting in a serious question of property rights.

*2. The case involving the interpretation of a Statute effecting property rights is of general importance or substance.*

Rule 38, paragraph (5), of the Rules of this Court provides that a revision on writ of certiorari, while a matter of sound judicial discretion, will be granted where there are

special and important reasons therefor. Among the following situations indicating the character of reasons which will be considered is this, Rule 38 (5c):

> "Where the United States Court of Appeals for the District of Columbia has decided a question of general importance or a question of substance relating to the construction or application of the Constitution, or Treaty, or Statute, of the United States, which has not been, but should be, settled by this Court; or where that Court has not given proper effect to an applicable decision of this Court."

A review on writ of certiorari, though not a matter of right but of sound judicial discretion, will be granted where there are special and important reasons therefor.

The affirmation of the case of Morris vs. Foster impliedly affirmed the Statute as construed in that case as being the law and rule of property, and it becomes important that this matter be settled by this Court. In the case of Worcester County Trust Co. vs. Riley Controller, et al., 302 U. S., 292-296, the Court said:

> "We granted certiorari, in 299 U. S., 567; 81 L. Ed., 417, the decision below being of an important question of Federal law which has not been but should be settled by this Court."

The Court of Appeals in its opinion in this case states that:

> "The question has not arisen since (the Morris case) but we think it of sufficient general importance to require re-examination."

Thus the question presented is one both of general importance or substance and involves the construction of a Statute of the United States applicable to the District of Columbia and within the Court's discretion and is one which should receive the special consideration which it merits.

## CONCLUSION

While the respondent infant son of the testator is deserving of sympathy the property rights of the stepchild, a legatee under the will of the testator, and the principal legatees, as well as the rights of the infant son of the testator are involved. Precedents and principles established by this Court in its denial of certiorari in Morris vs. Foster should not be departed from in order to meet what may be thought to be the abstract justice of a particular case.

For the reasons stated, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

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## APPENDIX A

Title 19, Sec. 103, D. C. Code, 1940, (Sec. 1626, D. C. Code, 1901), provides:

> "All wills and testaments shall be in writing and signed by the testator, or by some other person in his presence and by his express directions, and shall be attested and subscribed in the presence of the said testator by at least two credible witnesses, or else they shall be utterly void and of no effect; and, moreover, no devise or bequest, or any clause thereof, shall be revocable otherwise than by some other will or codicil in writing or other writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the testator himself or in his presence and by his direction and consent; but all devises and bequests shall remain and continue in force until the same be burned, canceled, torn, or obliterated by the testator or by his direction in the manner aforesaid, or unless the same be altered or revoked by some other will, testament, or codicil in writing, or other writing of the testator signed in the presence of at least two witnesses attesting the same, any former law or usage to the contrary notwithstanding. (Mar. 3, 1901, 31 Stat. 1433, ch. 854, 1626.)"

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DAVID H. ALSOP, et al.,
*Petitioners*

vs.

ROBERT AUGUST PASCUCCI, Infant
By DAVID A. HART, Guardian ad litem,
*Respondent.*

## REPLY OF RESPONDENT TO THE PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

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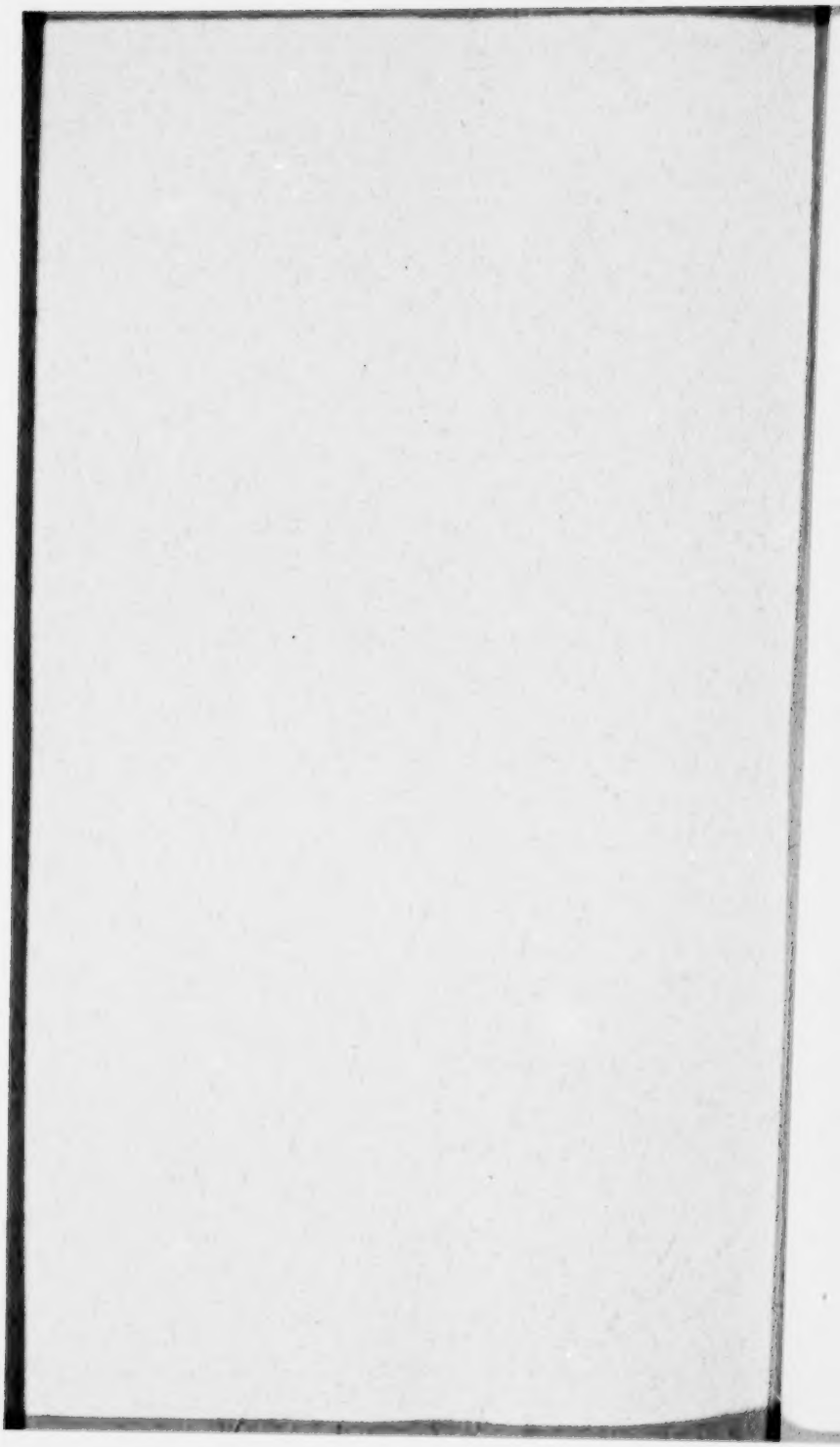

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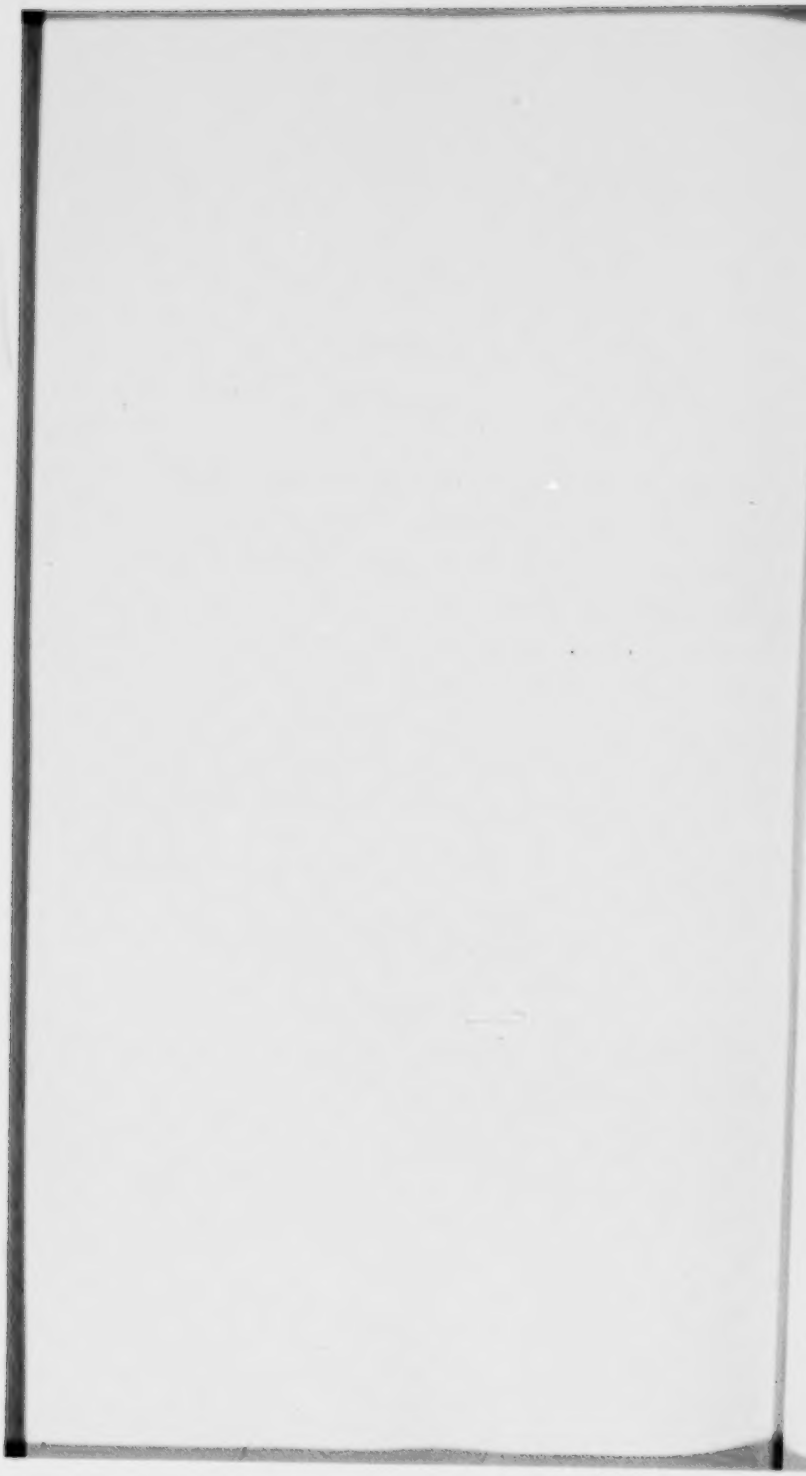

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David H. Alsop, et al.,
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---

## REPLY OF RESPONDENT TO THE PETITION FOR THE ISSUANCE OF A WRIT OF CERTIORARI

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Respondent opposes the issuance of a writ of certiorari because, in his view, the case does not fall within Rule 38 of this Court.

Moreover, the case involves the consideration of a statute, not national in scope but confined in its operation to the District of Columbia. Therefore the case of Del Vecchio v. Bowers, 296 U.S. 280, is pertinent. There, at p. 285, it was said:

> "In the view that the case does not fall within Rule 38, the respondent opposed the issuance of a writ of certiorari. The objection might be valid if the statute were confined in its operation to the District of Columbia. We will not ordinarily review decisions of the United States Court of Appeals, which are based upon statutes so limited or which declare the common law of the District. The Longshoremen's and Harbor Workers' Compensation Act, however, is national in

> scope, and a decision with respect to its enforcement constitutes a precedent of general application. We therefore granted the writ because of the important question as to the effect of Section 20(d)."

Petitioners do not attempt, by authorities, to demonstrate that the decision of the United States Court of Appeals for the District of Columbia, in the instant case, is unsound in law; their contention is that the Court of Appeals was bound by the stare decisis rule to follow its earlier ruling, regarding the same statute, in the case of Morris v. Foster, 51 App. D.C. 238, 278 F. 321, certiorari denied, 259 U.S. 582. The same point was made and relied on by the petitioners in the United States Court of Appeals. There petitioners said:

> "The issue here has been decided in the negative in the case of Morris v. Foster, 51 App. D.C. 238, 278 F. 321, in which it was held that methods of revocation are limited to those expressly enumerated in the statute, and the question is stare decisis."

But the stare decisis rule is not inflexible.

In Hertz v. Woodman, 218 U.S. 205, the Court, at p. 212, said:

> "The Circuit Court of Appeals was obviously not bound to follow its own prior decision. The rule of stare decisis, though one tending to consistency and uniformity of decision, is not inflexible. Whether it shall be followed or departed from is a question entirely within the discretion of the Court, which is again called upon to consider a question once decided."

In Barden v. Northern Pacific RR. Co., 154 U.S. 288, it is said:

> "It is more important that the Court should be right upon later and more elaborate consideration of the cases than consistent with prior declarations."

See Burnet v. Coronado Oil & Gas Co., 285 U.S. 393; also Graves v. Schmidlapp, 315 U.S. 657, 665; Helvering v. Hallock, 309 U.S. 106, 119.

In McKenna v. Austin, 134 F. (2) 660, Mr. Justice Rutledge, in speaking of the stare decisis rule, said that it "should be laid to rest."

The Court of Appeals of New York, in discussing the stare decisis rule in Rumsey et al., v. The New York and New England RR. Co., 133 N.Y. 79, 85, said:

> "It is no doubt true that even a single adjudication of this Court, upon a question properly before it, is not to be questioned or disregarded except for the most cogent reasons, and then only in a case where it is plain that the judgment was the result of a mistaken view of the condition of the law applicable to the question. But the doctrine of stare decisis, like almost every other legal rule, is not without its exceptions. It does not apply to a case where it can be shown that the law has been misunderstood or misapplied, or where the former determination is evidently contrary to reason. The authorities are abundant to show that in such cases it is the duty of the Courts to re-examine the question."

In United States v. State of Minnesota, 113 F. (2) 770, 774, the Circuit Court of Appeals said:

> "We are not unmindful of the doctrine of stare decisis, but recognize that it is entitled to great weight and should ordinarily be adhered to, unless the reasons therefor no longer exist, are clearly erroneous, or manifestly wrong. The strong respect for precedent which inheres in our legal system has its qualifications and limitations. It does not call for a blind, arbitrary and implicit following of precedent, but recognizes, no vested rights nor rule of property being involved, that it is more important as to far reaching judicial principles that the Court should be right than that it merely be in harmony with its previous decisions. Such a respect for precedent balks at the perpetuation of error and the doctrine of stare decisis is, after all, subordinate

to legal reason and is properly departed from if and when such departure is necessary to avoid the perpetuation of error."

The Morris v. Foster case did not declare any rule by which the right of property should be determined. The Morris case preserved the rights of three children against the claims of their stepfather, while the instant case protects the inheritance of a single child against the claim of the executors.

The term "rule of property" means "those rules governing the descent, transfer or sale of property, and the rules which affect the title and possession thereto." Bucher v. Cheshire RR. Co., 125 U.S. 555, 583.

Compare 25 C.J., p. 839 and p. 852.

In the light of all that has now been said, we do not perceive upon what basis of reason it can be said that the Court of Appeals should perpetuate error where clearly found to exist.

Respectfully submitted,

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